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No. 04-953

In The
SUPREME COURT OF THE UNITED STATES

PAUL E. WABEKE,
Petitioner

v

ANDREW J. MULDER,
Respondent

Petition For A Writ Of Certiorari
To The 6th Circuit Court of Appeals

PETITION REPLY BRIEF

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TABLE OF CONTENTS

Index of Authorities ii

1. THE 1ST AM., 14TH AM., PETITIONER AND OTHER *PRO SE* LITIGANTS NEED THIS COURT'S PROTECTION, BECAUSE THEY HAVE NO OTHER PROTECTION. 1

2. ROOKER-FELDMAN SHOULD BE REVISITED FOR COMPELLING REASONS. 2

A. Rooker-Feldman Demands Review Because It Effectively Reversed 200 Year Old Precedent Establishing Collateral Review By Federal Courts Of State Court Decisions. 2

B. Rooker Feldman Increases Costs For Pro Se Plaintiffs And Denies Resolution Of Important Issues. 3

C. The Rooker-Feldman Doctrine Appears To Conflict With 28 USC 1343. 3

D. Rooker-Feldman Deprives Pro Se Litigants Of A Decision On Whether The State Judge Was Biased, Incompetent Or Engaged In Conspiracy With Government Agents. 4

3. THE COURT SHOULD DECIDE WHEN FALSE STATEMENTS BY GOVERNMENT ATTORNEYS AND AGENTS IN CIVIL CASE VIOLATES DUE PROCESS OF LAW. 5

4. THIS COURT SHOULD CLEARLY DEFINE "FRIVOLOUS" LAWSUITS IN ACCORD WITH THE ABSOLUTE RIGHT TO PETITION PROTECTED BY THE FIRST AMENDMENT AND APPLY STRICT SCRUTINY. 8

CONCLUSION 10

INDEX OF AUTHORITIES

Declaration of Independence	4
First Am.	-1,2,8,9,10
6th Am.	4
14th Am.	1,2
28 USC 1343	4
42 USC 1983	2,7
BE & K Construction Co. v NLRB, 536 US 516 (2002)	9
Elliott v Lessee of Perisol, 28 US 328 (1828)	3
England v Louisiana St. Brd Med. Exam., 375 US 411 (1964)	3
Exxon-Mobil v Saudi Basic, #03-1696, cert granted)	8,9
Feldman v US, 322 US 487, 501-502 (1944)	1
Gertz v Robert Welch, Inc., 418 US 323, 340 (1974)	6
Grant v Moles, (unpubl, #94-1107, 7th Cir 1995)	2
Grievance Administrator v Rostash, 457 Mich 289; 577 NW2d 452 (1998).	6
Hoagland v Sandberg, 385 F3d 737, 739, 740 (7th Cir 2004)	3
In re: Judge Noecker, (MSC #124477, 2005)	6
In re Thomas, 441 Mich 1206	
Lachance v Erickson, 522 US 262 (1997)	6
Rooker v Fidelity Trust Co., 263 US 413 (1923)	3
State Bar Grievance Adm. v Markowitz, 393 Mich 6; 222 NW2d 504 (1974)	6
Tumey v Ohio, 273 US 510 (1927)	4
US v Recio, 537 US 270, 279 (2003)	5
Wolf v Strankman, 02-15720, 9th Cir, 2004)	2
Rule 42	9
ABA Journal, Feb. 2005,	2
Leviathan: The Growth of Local Government and the Erosion of Liberty, by Clint Bolick (Laissez Faire Books)	5
agcmi.com/#About	7

Respondent does not provide any reason why the substantial issues raised by the Petition should not be decided by this Court. In reply, Petitioner believes that the issues should be decided for the following reasons.

1. THE 1ST AM., 14TH AM., PETITIONER AND OTHER *PRO SE* LITIGANTS NEED THIS COURT'S PROTECTION, BECAUSE THEY HAVE NO OTHER PROTECTION.

The Petition and Response prove Petitioner, and other *pro se* litigants, are an *oppressed* minority. For that reason alone this case deserves review.

> "The founders of our federal government were too close to *oppressions* and *persecutions of the unorthodox, the unpopular, and the less influential,* to trust even elected representatives with unlimited powers of control over the individual. From their distrust were derived the first ten amendments [the Bill of Rights], designed as a whole to "*limit* and qualify the *powers of Government,*" to define "cases in which the Government ought not to act, or to act only in a particular mode", and to *protect unpopular minorities from oppressive majorities.* 1 Annals 437." (emphasis added) *Feldman v US,* 322 US 487, 501-502 (1944) dissent by Justice Black.

Petitioner believes that the First Am. right to petition is absolute and it applies equally to *pro se* litigants via the 14th Am. Equal Protection Clause. However, both are violated in this case.

It is evident from both parties filings that *pro se* litigants are being repeatedly enjoined from, and persecuted for, exercising their protected rights by judges all across America, some even requiring huge oppressive prefiling bonds. Resp. 23-24. (fn 1 See also

The Michigan Bar in a recent survey of state courts found that in many of the state courts citizens represented themselves from 0 to 100% of the cases.

According to the President of the ABA, *43 million* Americans are eligible for some Legal Services Corp. assistance, likely because of low income. (*ABA Journal*, Feb. 2005, p 6, President's Message, "Justice for all.") But that does not mean all of the poor have that resource. Many are not aware of it. Others cannot find an attorney. How many end up representing themselves?

Compare Petitioner's income - $800 *per month* - to what Respondent charges *per hour* - $102.50. (Pet. p 29-30; Resp. p 29-30) Is there desparity here? Are *pro se* litigants at a severe disadvantage?

In *Grant v Moles*, (unpubl, #94-1107, 7th Cir 1995) a *pro se* 42 USC 1983 case, a black driver was ticketed, allegedly for speeding, but contended the police had a policy of targeting black drivers with bogus traffic violations. He was barred a federal court decision on the merits by *Rooker-Feldman*.

In *Wolf v Strankman*, 02-15720, 9th Cir, 2004) a *pro se* cab driver has been barred from filing *pro se* lawsuits *by a California law* in effect since 1963. The district court said he could not challenge it because of *Rooker-Feldman*, but the 7th Cir. reversed.

If these oppressions of protected rights are allowed to continue, any and all rights may be oppressed by judical injunctions or lawmakers will. The 1st Am., 14th Am. and other rights will be remembered as whimsical illusions. All the issues raised by the Petition are ripe for decision.

2. ROOKER-FELDMAN SHOULD BE REVISITED FOR COMPELLING REASONS.

A. Rooker-Feldman Demands Review Because It Effectively Reversed 200 Year Old Precedent Establishing Collateral Review By Federal Courts Of State Court Decisions.

In 1828 this Court decided in *Elliott v Lessee of Perisol,* 28 US 328 (unanimous) that state court litigants who unjustly lost property had a right to a collateral decision in the federal courts on the issue. That was one hundred years *before Rooker v Fidelity Trust Co.,* 263 US 413 (1923). *Elliott* throws substantial doubt on the validity of *Rooker-Feldman* and of its own weight is substantial reason to revisit it.

In *Elliott,* there was a direct challenge to the lower federal court jurisdiction of the case in a state property rights case involving a clerk who altered property deed filings without authority. The *Elliott* Court unanimously upheld the *right to collateral review in federal courts of the state court decisions.* Plus, *Elliott* not only cast doubt on the state court judgment, but affirmed the judgment of the lower federal court who had heard the case.

B. Rooker Feldman Increases Costs For *Pro Se* Plaintiffs And Denies Resolution Of Important Issues.

Circuit Judge Posner accurately has stated that litigating jurisdictional questions, such as those in *Rooker-Feldman,* has a high cost for the parties and the courts. *Hoagland v Sandberg,* 385 F3d 737, 739, 740 (7th Cir 2004) The truth is most poor and *pro se* litigants cannot afford multiple appeals and some not even one.[1]

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[1] "Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two. Shuttling the parties between state and federal tribunals is a sure way of defeating the ends of justice. The pursuit of justice is not an academic exercise. There are no foundations to finance the resolution of nice state law questions involved in federal court litigation. The parties are entitled - absent unique and rare situations - to adjudication of their rights in the tribunals which Congress has empowered to act." ***England v Louisiana St. Brd Med. Exam.***, 375 US 411, 425, 11 L Ed 2d 440, 84 S Ct 461 (1964) (Justice Douglas quoting his

This cost is minimal however, compared to the costs of lost of faith in the judiciary branch to enforce the Constitution and government in general by large portions of this Country. (Waco, Ruby Ridge, Oklahoma)

C. The Rooker-Feldman Doctrine Appears To Conflict With 28 USC 1343.

28 USC 1343 clearly grants the federal district courts broad jurisdiction to hear civil rights complaints. It makes no distinction as to whether the civil rights violation occurred within a state case or outside of a state case, whether by a state judge, state lawyer, state clerk or federal janitor. Petitioner claims the jurisdiction of 28 USC 1343, and hereby moves to amend his pleadings to so include it.

D. Rooker-Feldman Deprives *Pro Se* Litigants Of A Decision On Whether The State Judge Was Biased, Incompetent Or Engaged In Conspiracy With Government Agents.

It has long been intended that litigants, including state litigants, are entitled to a decision by impartial decision makers. Declaration of Independence (jury); 6th Am. ("impartial jury"); *Tumey v Ohio*, 273 US 510 (1927) (unbiased judge). But *Rooker Feldman* is a total blockade to such determinations, when the state courts refuse to decide the issue.

Respondent submitted the evidence and it deserves exposure so this Court can decide whether *Rooker-Feldman* should be revisited. Both parties have referred to a previous lawsuit filed by Petitioner against Respondent *and Judge Bosman* that was dismissed by the district court *without any reference to Rooker-Feldman*. (Resp. App 20-27) However, it was affirmed by the 6th Cir. based on *Rooker-Feldman*. (Resp. App 34-36) The 6th Circuit decision states: "Wabeke claimed that the *defendants conspired to deprive him of due process of law in his state court suit* against the city of Holland." (emphasis

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dissent in ***Clay v Sun Ins***. 263 US 207, 228 ( ) and lamenting his approval of the abstention doctrine.)

added) (Resp. App 35) They then affirmed based on *Rooker-Feldman*, ignoring the conspiracy and violations of due process of law. [2]

Due to these and other experiences Petitioner has little faith in the impartiality of federal district and appellate courts when issues of state judicial bias are raised by *pro se* litigants. Petitioner believes there is substantial prejudice against *pro se* litigants within this circuit, at least. (See Pet. Aff. at p 29-30)

3. THE COURT SHOULD DECIDE WHEN FALSE STATEMENTS BY GOVERNMENT ATTORNEYS AND AGENTS IN CIVIL CASE VIOLATES DUE PROCESS OF LAW.

Martha Stewart just finished serving 5 months in prison for *lying* about a stock sale *to investigators*. But does the Commandment "Thou shall not lie" apply to government attorneys and agents in court proceedings, or only to the People? Should *pro se* litigants habitually be the losers because of lying government lawyers, agents and biased judges who refuse to consider the truth? (Pet. Aff p 29-30) Are government officials "required to turn square corners" or allowed to take unjust short cuts? *US v Recio*, 537 US 270, 279 (2003) (J. Stevens dissent).

It is well documented that in recent decades state and local public official powers have grown exponentially with virtually no accountability or limits. See *Leviathan: The Growth of Local Government and the Erosion of Liberty*, by Clint Bolick (Laissez Faire Books). Petitioner has attempted in the small ways he could - filing lawsuits - to provide some local limits and accountability. But in doing so, he has encounter devilish resistance and retaliation, much of it public. Respondent and dismissed state judges have been a part of the problem.

Respondent admits to being a lawyer for 29 years and being part of a private law firm representing the City of

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[2] To read more about the conspiracy and state appeals court action see Resp. App 20-22)

Holland. (Resp. ii, 30) He might even be a member of this Court's bar. But his integrity is in question because of deceptions in state and federal courts relative to this case. In fact, Petitioner believes he has attempted to mislead even this Court. Is he allowed, because of his high office, to make false statements in order to violate a citizens rights and/or retaliate? Thus far he has been. He has *Rooker-Feldman* absolute immunity.

Other than an a biased or unethical judge, there are few officials that can damage a person's rights in judicial proceedings more than a lying deceptive government attorney or official. *Gertz v Robert Welch, Inc.*, 418 US 323, 340 (1974) said "there is no constitutional value in false statements of fact." Known false statements in Court asserting facts or the law hinders justice. Obstructing justice violates the law.

An unethical government attorney damages not only the individual opponent, but also the law. Bad precedents are set by decisions unjustly obtained, as this one was. Plus there are no easy ways to reverse them.

> "To *deceive the court* is to undermine its very foundations, for it is a tenet of our judicial system that lawyers are officers of the court." (emphasis added) *State Bar Grievance Adm. v Markowitz*, 393 Mich 6, 12; 222 NW2d 504 (1974).

Like the Michigan Supreme Court said, this Court's "paramount concern must always be to safeguard the public. *In the Matter of Trombly*, 398 Mich 377, 382; 247 NW2d 873 (1976)" *Grievance Administrator v Rostash*, 457 Mich 289, 298; 577 NW2d 452 (1998).

In re: Judge Noecker, (MSC #124477, 2005) the judge was fired in part for *lies* to the JTC. [3] In *Lachance v Erickson*, 522 US 262; 118 S Ct 753; 139 L Ed 695 (1997) this Court held that the right to be heard in non judicial proceedings does not include the right to make false statements.

The misconduct of an opposing attorney in a case has extremely limited remedies. Generally it can only be addressed by the sitting judge, provided he is inclined to do something, which is not likely, especially when a *pro se* litigant is making the complaint. On appeal, the appellate court can either ignore the issue or address the misconduct when raised. Typically in *pro se* cases as here, the state court of appeals ignored it. If the misconduct is not addressed, the damage done in the case becomes permanent, even if an attorney grievance is filed. The only possible exception is if a collateral civil rights suit may be brought against the unethical attorney in federal court under 42 USC 1983.

In Michigan lawyers are rarely and lightly disciplined by the State Bar and Supreme Court. According to the Michigan Attorney Grievance Commission, 3373 grievances were filed in 2000, but only 126 (3.7%) resulted in any orders of discipline. (See agcmi.com/#About)

> "Since 1985, only former Judge James Del Rio has been denied reinstatement. Seventy lawyers have been reinstated, including lawyers who have *embezzled* and *misappropriated their clients money*, and who have *lied* and *cheated*." See 441 Mich Rep. at 1214.

In addition, an attorney grievance complaint is totally ineffective relief for the *pro se* litigant. First, it does not reinstate the case, even if the complaining party should prevail and the attorney is held accountable. Secondly, since in Michigan and elsewhere attorneys are "self governing", the probability of a *pro se* litigant getting any sort of relief is unheard of. Third, the whole process is encased in secrecy. Fourth, without the state having any licensing scheme for attorneys, unethical attorneys are totally free to continue unethical practices without consequences. Petitioner is not aware of any *pro se* complaint resulting in any discipline.

Without any effective check, such as this civil rights lawsuit for damages, such attorneys have free rein to violate *pro se* citizens. *Rooker-Feldman* thus blocks the only truly

effective form of relief - a civil rights lawsuit in federal court. *Rooker-Feldman* in effect grants absolute immunity, via the backdoor, to unethical attorneys and assures them the protection of the federal courts also.

4. THIS COURT SHOULD CLEARLY DEFINE "FRIVOLOUS" LAWSUITS IN ACCORD WITH THE ABSOLUTE RIGHT TO PETITION PROTECTED BY THE FIRST AMENDMENT AND APPLY STRICT SCRUTINY.

President Bush has said he is attacking "frivolous" lawsuits and supposedly has signed a law to move them to federal court. But his definition is vague and overbroad, mostly covering large class action suits against corporations.

Respondent continues to oppressively and deceptively allege Petitioner files frivolous lawsuits. He and his attorney allege even this Petition is frivolous and seek monetary relief. Resp. p 29-30. Perhaps, as an included question, this Court should strictly define "frivolous" in relation to this First Amendment case and for the protection of severely oppressed *pro se* litigants. It is a term that is much blown about by hot aired attorneys, and often judges, bent upon retaliation and silencing the critical and whistleblowing speech of *pro se* opponents exposing injustice and corruption. Furthermore, maybe the Court should examine the state procedure where false information, submitted by Respondent, and questionable process was utilized to secure these unjust state injunctive orders.

In defense against Respondent's charge of frivolousness in this Petition, the Court is well aware that corporate giant *Exxon-Mobil* (*v Saudi Basic*, #03-1696, cert granted) has recently challenged the wholesale expansion of *Rooker-Feldman*.

Respondent also *falsely* claims that there is no conflict between the circuits on *Rooker-Feldman*. (See Resp. p 10-17) But the truth is, as pointed out in the *Exxon* petition, there is indeed conflict. (See *Id.* p 20-) In fact, this Court has accepted the case to decide that issue.

Plus, judicial note should be made that *Exxon* has never been enjoined from exercising its First Am. right to petition, and certainly not for 7 years, as Petitioner has. The unanimous decision in *BE & K Construction Co. v NLRB*, 536 US 516 (2002) proves this challenge is not frivolous either.

Obviously, Petitioner does not have opportunity here to fully or fairly defend himself. However, Respondent has supplied information that leads to the conclusion that not all of his state litigation has been frivolous, as alleged, either. A federal district judge noted that Petitioner won in a small measure at the Michigan Court of Appeals in his previous federal civil rights case. (Resp. App 21-22.) That small short lived win was tempered, however, by the subsequent unjust dismissal of that federal civil rights suit against Respondent and the same state judge who later issued the first injunction relevant here. Resp. 20-27. Subsequently, the 6th Circuit invoked *Rooker-Feldman* to bury the case. Resp. App. 34-36.

How can a *pro se* litigant, often poorly educated and without law resources, prove his case is not frivolous with a biased and/or incompetent and retaliatory judges who dismisses the case without attempting to decide the merits?

The net effect is that *pro se* litigants have *no just opportunity* whatever to prove their case or challenge biased state judges or unethical state attorneys who inflict injustice on the People by lies, judicial misconduct, conspiracies, etc. That is not what the Founders and People intended.

In *BE & K Construction Co. Id.* this Court reversed the 6th Circuits affirmance of retaliation in relation to the NLRB and union/employer lawsuits based on the First Amendment right to petition. Similar standards should be imposed for the First Amendment protections of Petitioner and all other *pro se* litigants.

Perhaps also this Court should amend its Rule 42 to *equally* include respondents who file frivolous and/or misleading answers to petitions, as shown here. Maybe then *pro se* petitioners will find a little justice.

CONCLUSION

This case is Goliath v David. The "leviathan" government bullies v the weak *pro se* minority. It reveals, in small part, that *pro se* litigants are a severely oppressed minority destined to perpetual defeat in the judicial arenas. Respondent would like this Court to strike the last nail in the coffin of *pro se* litigants Constitutional rights - *all* of them - by refusing to review the First Am., *Rooker-Feldman Doctrine* and other issues in this case. Petitioner requests that the Court decide the important issues raised by this case in favor of the Constitution and those it was intended to protect.

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